Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A long-time resident of California sued that State in a Nevada state court, alleging that California committed the torts of invasion of privacy, outrage, abuse of process, and fraud in the course of a personal income tax investigation concerning the timing of the individual's change of residence from California to Nevada. California Government Code section 860.2 reads: "Neither a public entity nor a public employee is liable for an injury caused by . . . (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax."

In *Nevada v. Hall*, 440 U.S. 410 (1979) this Court ruled that, in a tort action against Nevada arising out of a traffic accident occurring in California, California need not give full faith and credit to Nevada's statutory limitation on liability for injuries caused by Nevada state employees. However, the Court also noted that its ruling was fact-based: "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. The question presented is:

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

Respondent Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

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OPINIONS BELOW

The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated April 4, 2002 (Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549), is printed in the Appendix, *infra*, at pp. 5-18. The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated June 13, 2001 (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)) is printed in the Appendix, *infra*, at pp. 38-44. The written decision of the Nevada Supreme Court in Case Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the protective order, is printed in the Appendix, *infra*, at pp. 19-21. The Protective Order of the Eighth District Court of the State of Nevada Protective Order is printed in the Appendix, *infra*, at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions For Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition For Writ of Mandamus and Writ of Prohibition pertaining to the protective order. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a) because the Nevada Supreme Court rejected

California's claim of right under Article IV, Section 1, of the Constitution, the "Full Faith and Credit Clause."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth verbatim in Appendix, *infra*, pp. 45-48.)

United States Constitution, Art. IV, § 1, The Full Faith and Credit Clause.

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue and Taxation Code § 19041

California Revenue and Taxation Code § 21021

STATEMENT OF THE CASE

Pursuant to its inherent sovereign powers, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing the California state personal income tax.

Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with FTB asserting that he had terminated his California residency and moved to Nevada on September

26, 1991 just before certain companies paid him $40 million cash in "patent licensing fees" for a patent he had obtained while a resident of California. Hyatt did not report the $40 million as California income subject to the state personal income tax. The FTB conducted an audit investigation of his filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April of 1992. In these Notices of Proposed Assessment the FTB also asserted a civil fraud penalty. Hyatt filed a protest[1] of these Notices of Proposed Assessment. That protest is still pending in California. After filing his protest, Hyatt filed a lawsuit for monetary damages against FTB in Respondent Nevada state court alleging the commission of fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB in both California and Nevada. (Amended Complaint for Declaratory Relief and Tort Damages is printed in the Appendix, *infra*, at pp. 49-90)

The amended complaint sought declaratory relief that Hyatt was a Nevada resident and not subject to California personal income tax. In his action, Hyatt is seeking hundreds of millions of dollars in damages based upon allegations of the common law torts of: 1) unreasonable intrusion upon the seclusion of another; 2) unreasonable publicity given to private facts; 3) casting plaintiff in a false light; 4) outrage; 5) abuse of process; 6) fraud; and 7) negligent misrepresentation.

[1] A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041. The hearing officer on the Hyatt protest is an attorney.

The request for declaratory relief was dismissed by Nevada state court on FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. But Hyatt was allowed to proceed with his tort claims. The Nevada courts also imposed a Protective Order that directs the FTB not to share information it acquired during the course of the lawsuit with the FTB employees conducting the ongoing administrative proceeding involving Hyatt's personal income tax obligations without first requesting Hyatt's permission to make the documents available. If Hyatt refuses permission, the Protective Order directs the FTB to attempt to obtain the documents through the administrative process. (Protective Order is printed in the Appendix, *infra*, at pp. 22-35) In addition, the Nevada district court ordered the FTB to produce certain documents that, under California evidentiary and administrative law, would be barred or precluded from disclosure. FTB filed its first writ petition with the Nevada Supreme Court in Case Number 35549 contesting these discovery orders.

While that first writ was pending before the Nevada Supreme Court, FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal for lack of jurisdiction. That motion was denied by the trial court, and FTB filed a second writ petition in the Nevada Supreme Court, Case Number 36390. On June 13, 2001, the Nevada Supreme Court granted that second writ petition, finding that Hyatt "failed to show any evidence of tortious conduct on the part of the Franchise Tax Board." The Nevada Supreme Court ordered the trial court to enter summary judgment in favor of FTB and dismissed the first writ petition as being moot.

After the Nevada Supreme Court entered its order granting the second writ petition, the FTB filed a motion with the trial court to vacate the Protective Order. That Protective Order had effectively served to prevent the FTB from sharing information it had acquired during the lawsuit with the administrative audit review that California was still conducting to determine whether Hyatt owed additional taxes and should be subjected to a civil fraud penalty for 1991 and 1992. This motion to vacate was denied, and another petition for writ and appeal was filed by the FTB with the Nevada Supreme Court on March 4, 2002.

On April 4, 2002, pursuant to Hyatt's petition for reconsideration, the Nevada Supreme Court issued two separate orders in this case. First, with certain exceptions, the court denied FTB's petitions for writ of mandamus and prohibition. With respect to the mandamus petition, the court refused to grant full faith and credit to California's immunity laws as barring Hyatt's Nevada suits based on the common-law intentional torts; however, the court did make allowance for California's statutory immunity for *negligent* acts, on the ground that such an allowance would not contravene any Nevada interests. With respect to the prohibition petition, the court generally ordered the disclosure and release of documents that are considered confidential and not subject to disclosure under California law; however, the court did bar the district court from requiring the FTB to release one particular document. (Appendix, *infra*, at pp. 3-4) Second, the court denied the FTB's petition for writ of mandamus or prohibition challenging the

district court's denial of the FTB's motion to vacate a protective discovery order.[2] (Appendix, *infra*, at pp. 19-21.)

REASONS FOR GRANTING THE WRIT

I. NEVADA'S REFUSAL TO EXTEND FULL FAITH AND CREDIT TO CALIFORNIA'S TAX IMMUNITY LAW CRIPPLES CALIFORNIA'S ABILITY TO PERFORM ONE OF ITS CORE SOVEREIGN FUNCTIONS, IN THIS CASE ENFORCEMENT OF CALIFORNIA'S PERSONAL INCOME TAX LAW.

California taxes all of the income of its residents, whether earned within or outside California. In addition, it taxes the income received from California sources of non-residents. As part of its tax-enforcement procedures, a core sovereign function, FTB conducts "residency audits" of former California residents now living in other States, for the purpose of determining the existence and extent of any tax obligation owing for the period of California residency and to determine whether they had California source income. Residency audits necessarily involve official tax enforcement activities both within California and in other States.

Under California law, there are multiple jurisdictional bars to bringing a lawsuit based on an ongoing administrative tax investigation, such as a residency tax audit, yet the Nevada Supreme Court refused to extend full faith and credit to California's immunity laws. It is important

[2] The order also dismissed the FTB's appeal from the same order.

that this Court grant the writ in this case to protect California's – or indeed any State's – ability to undertake the exercise of a core sovereign function without exposing it to potentially *unlimited* tort liability to *private parties* in the courts of *sister States*. California has found it necessary to enact a broad immunity scheme, with no geographical restriction on its application, to protect its sovereign tax administration activities. In order to protect the balance inherent in our Constitution's federal system, it is important that this Court protect California's efforts by affirming that full faith and credit applies in such circumstances.

In *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), this Court anticipated that there could be circumstances where even differing state policies would not justify denying full faith and credit to a sister State's body of law. It was suggested that such circumstances might arise where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism[,]" such as where it interferes with a State's "capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. This Court explained that *Nevada v. Hall* was not such a case. The FTB believes, however, that this case is precisely what was anticipated by footnote 24.

Because the FTB's alleged torts in this case arose within the context of an administrative tax investigation, California Government Code § 860.2 specifically immunizes the FTB from Hyatt's claims:

> "Neither a public entity nor a public employee is liable for an injury caused by:

"(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

"(b) An act or omission in the interpretation or application of any law relating to a tax."

California case law dealing with § 860.2 has given it a broad interpretation. For example, *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750, 753 (1986), dismissed negligence, slander of title, interference with credit relations, and due process claims against the FTB based on § 860.2.[3]

As footnote 24 of *Nevada v. Hall* contemplated, it is vital to protect the States' ability to carry out their core sovereign functions, protected by their immunity laws, without the risk of having to defend themselves in the courts of sister States. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration to the entirety of FTB's conduct, including its conduct in Nevada. Here, Hyatt, a long-time California resident now allegedly living in Nevada, was the subject of a California residency audit. He has sued California in a Nevada state court under Nevada law alleging invasion of privacy, fraud, and

[3] However, section 860.2 does not exist in a vacuum, but is part of a larger statutory scheme for dealing with claims that misconduct of some variety occurred during a tax investigation or proceeding. For example, California Revenue and Taxation Code § 21021 provides taxpayers with a cause of action whenever the tax agency fails to follow board published procedures. On the other hand, California's Tort Claims Act, Gov't Code §§ 911.2, 905.2, and 945.4, bars lawsuits for monetary damages against California or a state employee without first complying with the claims presentation requirements.

abuse of process during the residency audit. However, rather than applying California law, the Nevada Supreme Court has ruled that Hyatt may prosecute his claims against California in Nevada state courts for alleged tortious conduct that comprises the FTB's administrative audit activities notwithstanding California's immunity provisions against suit for tax enforcement activities. Thus, California was deprived in this case of reasonable reliance on an immunity statute that was specifically enacted to protect the core sovereign function of state tax enforcement. Refusal to apply California law here severely hampers California's ability to undertake this core sovereign function. More importantly, the widespread application of the rule set down by the Nevada Supreme Court could cripple the States' ability to conduct vital state programs and protect vital state interests that are necessary to enable them to carry out core state functions.

There should be no doubt in this case that FTB was carrying out core sovereign functions. "'[T]axes are the life-blood of government. . . .'" *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 523 (1984), quoting *Bull v. United States*, 295 U.S. 247, 259 (1935). In another context, involving congressional limitation of federal court jurisdiction, this Court has recognized "'the imperative need of a State to administer its own fiscal operations'" and the congressional intent to limit interference with "'so important a local concern as the collection of taxes.'" *Franchise Tax Board of Cal. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990). The determination of residency is a foundational step in the collection of state personal income taxes. The FTB's acts were all performed as a part of the determination of residency, and thus were undertaken as

part of the State of California's inherent sovereign power to assess and collect taxes.

Allowing Hyatt to proceed notwithstanding the existence of California laws barring his action would seriously interfere with California's capacity to fulfill its sovereign responsibilities. California has the sovereign responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making minimal disclosure to others of identifying information about Hyatt for the purpose of determining his residency under these laws. Allowing Hyatt to litigate these acts further without applying California law would impede the FTB's entire residency audit program, as making even minimal inquiries and information disclosures out of state would expose the FTB to the threat of protracted, out-of-state tort litigation about its residency audit processes. This would necessarily interfere with the FTB's ability to administer California's tax laws, since consulting third party sources and making minimal information disclosures out of state are often required to investigate change of residency claims.

In addition, allowing Hyatt's case to proceed also exposes California to additional legal expenses and the threat of punishment for trying to obtain relevant information during residency audits. The FTB has incurred substantial additional litigation expenses before it has even finalized its proposed tax assessment against Hyatt. The FTB's administrative process could result in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has been called to justify in Nevada courts virtually all of its audit actions and conclusions as if the final administrative result were set in stone. This is a subversion of California's tax administrative process.

Nevada's refusal to apply California's governmental immunity laws to Hyatt' s case, which arises entirely from acts incident to California tax administration, violates the Full Faith and Credit Clause of the United States Constitution.

II. AS SHOWN BY THE ORDER OF THE NEVADA SUPREME COURT IN THIS CASE, AND CONTRASTING RESULTS IN OTHER STATES, THE STATES REQUIRE GUIDANCE IN THE INTERPRETATION AND APPLICATION OF THE FULL FAITH AND CREDIT ANALYSIS OF *NEVADA V. HALL*.

In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California negligently caused an accident resulting in severe physical injury to California residents. At the time, Nevada law limited tort recoveries against the State of Nevada to $25,000. The California courts declined to apply this limitation on Nevada's statutory waiver of its immunity from suit. *Nevada v. Hall*, 440 U.S. at 412-413. This Court affirmed, holding that the Full Faith and Credit Clause did not require California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S. at 424. The Court noted that California had an interest in providing full protection to those injured on its highways, and that requiring California to limit recovery based on Nevada law would have been obnoxious to California's policy of full recovery. *Ibid*. As noted above, however, the Court also stated that a different analysis might apply where one State's exercise of jurisdiction over a sister State could "interfere with [the sister State's] capacity to fulfill its own sovereign responsibilities":

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion in this case, to consider whether different state policies, either of California or Nevada, might require different analysis or a different result. *Nevada v. Hall*, 440 U.S. at 424 n.24.

Numerous courts have recognized the *Nevada v. Hall* exception suggested in footnote 24, which the FTB asserts applies in this case. In fact, several state courts have applied it, and have dismissed lawsuits against sister States as a result. But in this case the Nevada courts did not believe that this suit was precluded by the exception anticipated in *Nevada v. Hall.*

For example, in *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey Court, but the New Jersey court dismissed the case under the exception to *Nevada v. Hall. Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a State could be sued in another as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

> The present case requires a 'different analysis' and a 'different result.'. . . Plaintiff, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a 'substantial threat to our constitutional system of cooperative federalism.' *Id.*

Xiomara Mejia-Cabral v. Eagleton School, 97-2715 (1999 Mass. Super. Lexis 353, September 15, 1999), involved another application of the *Nevada v. Hall* footnote 24 exception. The plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was also joined as a third-party defendant under allegations that it was negligent in placing the juvenile at the school. The Massachusetts court contrasted *Nevada v. Hall* and dismissed the State of Connecticut as a defendant, noting that:

> The prospect of one state's court deciding whether another state was negligent in selecting a particular rehabilitation program for a juvenile offender is profoundly troubling and this court's assertion of jurisdiction over such a claim against the state of Connecticut would pose a 'substantial threat to our constitutional system of cooperative federalism.' The State of Connecticut makes a compelling argument that this third-party complaint would, if allowed to proceed, 'interfere with [Connecticut's] capacity to fulfill its own sovereign obligations' and that recognition of its sovereign immunity is therefore mandatory. *Id.* (Internal citations omitted.)

The analyses, and indeed the results, in *Guarini* and *Xiomara Mejia-Cabral* are contrary to that of the Nevada Supreme Court in the present case. These contrasting views underscore the need to clarify the footnote 24 exception of *Nevada v. Hall*. In the final analysis, the Nevada Supreme Court's decision in this case is inconsistent with the interpretation and application of that decision by other States. Only this Court can speak authoritatively to the reach of its decision in *Nevada v. Hall*. Only this Court can fully resolve the proper application of the Full Faith and Credit Clause of the United States Constitution in the protection of the core sovereign functions of the several States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

WRIT OF MANDAMUS

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are directed to grant Franchise Tax Board's motion for summary judgment as to the negligence claim, in the case entitled Hyatt vs. Franchise Tax Board, Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti, and Myron E. Leavitt, Associate Justices of the Supreme

Court of the State of Nevada, and attested by my hand and seal this 4th clay of April, 2002.

[SEAL] /s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549

WRIT OF PROHIBITION

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are prohibited from requiring Franchise Tax Board to release document FTB No. 07381, in the case entitled Hyatt vs. Franchise Tax Board, Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti, and Myron E. Leavitt, Associate Justices of the Supreme

Court of the State of Nevada, and attested by my hand and seal this 4th day of April, 2002.

[SEAL] /s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT Real Party in Interest.	No. 36390

ORDER, GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

(Filed April 4, 2002)

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's

petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt – a long-time California resident who moved to Clark County, Nevada – to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District

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[1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an *amicus curiae* brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A Petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have

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[2] NRS 34.160 (mandamus).

[3] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4] NRS 34.320 (prohibition).

[5] NRS 34.170; NRS 34.330.

[6] *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7] *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

[8] *Id.*

extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly provided its state taxation agency, Franchise Tax Board, with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of

[9] NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

[10] *See* NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

[11] *See* Cal. Gov't Code §860.2; *Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12] *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).

[13] *Id.* at 421-24.

law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to govern with respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

Comity

The doctrine of comity, is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

[14] *Id.* at 414-21.

[15] *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

[16] *Nevada v. Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17] *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a discretionary function,[19] and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring

[18] Cal. Gov't Code § 860.2; *see Mitchell*, 228 Cal. Rptr. at 752.

[19] *Foster*, 114 Nev. at 941-43, 964 P.2d at 792.

[20] NRS 41.032(2).

complete immunity for its taxation agency.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

[21] *See Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

[22] *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23] *See In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is, protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a

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[24] *See Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

[25] *See Coastal States*, 617 F.2d at 862-64.

[26] *See Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

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[27] *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune
Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune
Frankovich & Hicks LLP/Reno
Bernhard & Leslie
Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Marquis & Aurbach
Clark County Clerk

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[28] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianecki v. District Court*,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted

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[1] 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]

/s/ Rose , J.
Rose

[2] *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 39274
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Appellant vs. GILBERT P. HYATT, Respondent.	No. 39312

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND DISMISSING APPEAL

(Filed Apr. 4, 2002)

Docket No. 39274 is a petition for a writ of mandamus or prohibition, which challenges a district court order denying petitioner's motion to vacate a protective discovery order. Docket No. 39312 is an appeal from the same order.

In related writ proceedings, Docket No. 35549 and Docket No. 36390, we vacated the stay upon which petitioner's motion to vacate was premised. We rejected petitioner's argument that the district court lacked subject matter jurisdiction, and we also declined to review the propriety of the protective order. We conclude that extraordinary relief is also not warranted in this proceeding. Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the protective order on appeal if it is aggrieved by the district court's final judgment. Accordingly, we deny the petition in Docket No. 39274.[1]

The protective discovery order is an interlocutory order, which is not substantively appealable. The right to appeal is statutory; if no statute or court rule provides for an appeal, no right to appeal exists.[2] Accordingly, as we lack jurisdiction, we dismiss the appeal in Docket No. 39312.

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[1] *See* NRAP 21(b); *Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991); NRS 34.170 (mandamus); NRS 34.330 (prohibition).

[2] *See Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984); *Kokkos v. Tsalikis*, 91 Nev. 24, 530 P.2d 756 (1975).

It is so ORDERED.[3]

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Rose, J.
Rose

/s/ Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Reno
Bernhard & Bradley, Chtd.
Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Clark County Clerk

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[3] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	CASE NO.: A382999 DEPT NO.: XVIII DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION (Filed Dec. 27, 1999)

Date of Conference: November 9, 1999

Time of Conference: 10:00 a.m.

NATURE OF ACTION

Protective Order for Confidential Information, decided in conjunction with the Defendant's Motion to Compel Discovery Responses.

APPEARANCES

At the November 9, 1999 hearing, Mark A. Hutchison, Thomas K. Bourke, and Donald J. Kula appeared on behalf of the Plaintiff, Gil Hyatt, and James A. Bradshaw, Thomas R. C. Wilson, Matthew C. Addison, and Felix E. Leatherwood appeared on behalf of the Defendant the Franchise Tax Board of California, *i.e.* the FTB.

FINDINGS

1. The FTB brought a Motion to Compel Production of Discovery Responses. The FTB attached to its motion its proposed Protective Order for Confidential Information.

2. Hyatt attached to his opposition to the FTB's Motion to Compel Discovery Responses his proposed Protective Order. Hyatt also attached to his opposition earlier versions of his proposed Protective Order that were subsequently modified based upon FTB objections.

3. The parties were unable to agree upon a stipulated Protective Order and requested that the Court resolve the dispute over the Protective Order in conjunction with the FTB's Motion to Compel Discovery Responses.

4. At the November 9, 1999 hearing on the FTB Motion to Compel Discovery Responses, the Discovery Commissioner found that the proposed Protective Order submitted by Hyatt, with certain modifications specified

by the Discovery Commissioner during the hearing, is appropriate in this case because it will provide protection for "Confidential Information" so designated by the parties and will also allow the parties to use "Confidential Information" as necessary within the confines of this litigation in order to prosecute, in the case of Hyatt, and defend, in the case of the FTB, the claims at issue.

RECOMMENDATION

The following Protective Order is recommended:

1. Definitions

A. "FTB" shall mean defendant Franchise Tax Board of the State of California, and specifically its employees, officers, or board members to whom it is necessary to show "Confidential Information," subject to further limitations below, in order to assist the FTB attorneys with respect to the defense of this Action.

B. "Hyatt" shall mean plaintiff Gil Hyatt.

C. "Party" and "Parties" shall mean one or more of the plaintiff or defendant in this action.

D. "Confidential Information" shall mean and be limited to "Hyatt Confidential Information" and "FTB Confidential Information" whether produced or otherwise disclosed in this action, including (a) any documents and things and copies thereof, (b) any answers to interrogatories and responses to requests for admissions, and (c) any testimony given in this Action by the Parties, their officers, directors, agents and/or employees, or by other witnesses, whether by deposition or at trial.

E. The designation "Confidential – NV Protective Order" shall be plainly legible on each page of each

document. In lieu of marking the original of the documents, the designating party may mark the copies that are produced or exchanged.

Confidential Information in other than a documentary or written form shall be identified as Confidential Information on the stenographic record contemporaneously with testimony revealing Confidential Information or within 30 days after the written transcript of such proceeding has been prepared and disseminated by the Court reporter.

Abuse of the "Confidential – NV Protective Order" designation shall result in sanctions to the offending party.

2. This Protective Order shall be governed by Rule 26 of the Nevada Rules of Civil Procedure and applied and interpreted pursuant to Nevada law. Confidential Information disclosed by Hyatt to the FTB is subject to all requirements of confidentiality imposed by the laws of the State of Nevada. This order is not intended to supplant, alter, modify, or reduce the FTB's requirements of confidentiality under California law. This order is intended only to assist and facilitate the exchange of Confidential Information between the Parties to this Action and assist and facilitate this Court in its administering of such exchanges.

A. Hyatt Confidential Information may not be disclosed, revealed, or disseminated by the FTB and its counsel and FTB Confidential Information may not be disclosed, revealed, or disseminated by Hyatt and its counsel, except to the following individuals and in the following manner:

(i) To the counsel of record for the opposing Party and counsel for any witnesses and their respective stenographic, clerical, and paralegal employees. It shall be the responsibility of the attorneys to

ensure that their respective stenographic, clerical, and paralegal employees understand and comply with this Protective Order. Violation of the Protective Order by any employee will be imputed to the attorneys.

(ii). To the opposing Party. In the case of the FTB this includes employees, officers, and board members to the extent necessary to assist FTB counsel in the defense of this Action.

(iii). To court reporters and videographers covered by Paragraph 9 herein, after reading this Protective Order and executing a copy of Exhibit A attached hereto.

(iv). To experts or consultants, whose advice and consultation are being or will be used by the opposing Party in this Action, provided that such experts or consultants read this Protective Order and execute a copy of Exhibit A attached hereto.

(v). To such other persons as hereafter may be designated by written stipulation of the Parties or by further order of the Court on motion by either party subject to the notice provisions of Paragraph 16 below.

3. The FTB and its attorneys shall not use Hyatt Confidential Information and Hyatt and his attorneys shall not use FTB Confidential Information in any manner whatsoever except solely for discovery and preparation of discovery, preparation for trial, trial, and any appeals related to this Action. Furthermore, no Party or employee, officer, or board member of the FTB, or any other person, firm, corporation, attorney, or other entity subject to this Protective Order shall give, show, disclose, make available, or communicate Confidential Information (in any form and whether or not specific identifying information has been redacted or modified) to any person, firm, corporation, or other entity not

expressly authorized by this Protective Order to receive such Confidential Information.

4. To the extent that either Party desires to use Confidential Information acquired under the terms of this Protective Order in the pending tax assessment and collection case which the FTB is now pursuing against Hyatt in the State of California including, but not limited to, the pending protests for taxable years 1991 and 1992 ("California Tax Case"), the requesting Party shall give notice to the opposing Party and specify the precise Confidential Information it desires to be submitted as part of that California Tax Case. If the opposing Party objects to the use of the Confidential Information in the California Tax Case, the requesting Party must seek and obtain permission to use and submit the Confidential Information in the California Tax Case in accordance with California law. In the event Hyatt does not to agree to voluntarily produce the Confidential Information to the California Tax Case, the FTB may seek to compel Hyatt to produce the requested Confidential Information in the California Tax Case through issuance and service of an administrative subpoena as governed by California law. This Protective Order in no way affects, limits, or modifies either parties' respective rights in regard to seeking or opposing an administrative Subpoena under California law.

Notwithstanding any other provision in this Protective Order, no FTB attorneys and/or FTB staff assigned to the pending protests for 1991 and 1992 or assigned to the California Tax Case shall have access to any Confidential Information, absent the FTB giving notice to Hyatt pursuant to this Protective Order and specifying the precise Confidential Information the FTB desires to provide to those individuals as part of that California Tax Case.

5. All Confidential Information filed with the Court for any purpose shall be filed in a sealed envelope or other container marked on the outside with the title of the action, an identification of each item within, and a statement substantially as follows:

> Confidential Information Subject to Protective Order. This item shall not be opened except as ordered by the Court in this action or upon written stipulation executed by all the Parties and filed in Court in this action.

This envelope or other container shall not be opened except as ordered by the Court or upon written stipulation executed by the Parties to this action or their counsel and filed in Court in this action. All such documents so filed in Court shall be treated in accordance with the provisions of this Protective Order relating to Confidential Information.

6. In the event Hyatt or the FTB wishes to use or refer to any Confidential Information in any affidavits, briefs, memoranda of law, or other papers filed in Court in this action, such affidavits, briefs, memoranda of law, or other papers so filed shall be designated as "Confidential Information – Subject to Protective Order" and shall be maintained under seal by the Court and treated by the Court in accordance with the provisions of this Protective Order relating to Confidential Information.

7. Counsel shall, while eliciting testimony concerning Confidential Information or which might result in the disclosure of Confidential Information, exclude from the room during a deposition, hearing, trial, or other proceedings, any person who is not entitled under this Protective Order to receive Confidential Information. Confidential Information shall not be disclosed to the witness then testifying except in strict conformity with the provisions of this Protective Order, including the

requirement that the testifying witness agree to be bound by the terms of this Protective Order by executing the Agreement set forth in Exhibit A hereof.

8. Any court reporter or transcriber who reports or transcribes testimony in this action at depositions, hearings, or other proceedings shall agree by a statement on the record, before recording or transcribing any such testimony constituting Confidential Information, that all such testimony and information revealed at the deposition, hearing, or other proceeding is and shall remain confidential and shall not be disclosed by any such reporter or transcriber except to attorneys for a Party who are authorized by this Protective Order and any other person who is authorized by this Protective Order to be present while such testimony is being given, and that copies of any transcript, reporter's notes, or any other transcription records of any such testimony shall be retained in confidence and safekeeping by such reporter or transcriber or shall be delivered to the Court in the manner specified in Paragraphs 5 and 6 herein, or to the attorneys for the Parties.

9. The Clerk of the Court is directed to maintain under seal all documents and all transcripts of deposition testimony filed with this Court in this action by any Party which are in whole or in part designated as Confidential Information including all pleadings, deposition transcripts, exhibits, discovery responses, or memoranda purporting to reproduce or paraphrase such information. The person filing such material shall advise the Clerk, as set forth in paragraph 5 hereof, that all or a designated portion thereof is subject to this Protective Order and is to be kept under seal. Upon the default of the filing Party to so designate, any Party may so advise the Court.

10. No Party to this proceeding may offer or elicit any testimony, exhibits, or other evidence containing or

disclosing Confidential Information unless such Party first ensures that adequate safeguards against unauthorized disclosure of such information have been implemented. Such safeguards shall include the exclusion from such proceedings of any persons not authorized access to such information pursuant to the terms of this Protective Order and other measures reasonably necessary in order to preclude unauthorized disclosure of such information. In the event that any Confidential Information is used in any court proceeding, it shall not lose its confidential status merely through such use.

11. Nothing in this Protective Order shall preclude any Party to the action, its attorneys, or any other person from disclosing or using, in any manner or for any purpose, any information or documents not obtained in discovery from the producing Party in this action, if such information was lawfully obtained, even though the same information or documents may have been produced in discovery in this action and designated as Confidential Information.

12. Nothing in this Protective Order shall preclude any party to this action or their attorneys from showing a document designated as Confidential Information to an individual who either prepared, is a designated or authorized recipient of or previously lawfully reviewed the document.

13. Nothing herein shall prevent disclosure beyond the terms of this Protective Order if the disclosing Party consents in writing to such disclosure of information designated as Confidential Information.

14. This Protective Order involves only the relative rights and obligations of the Parties as to the confidentiality of any information disclosed, or documents supplied, in this action. This Protective Order does not abrogate or diminish any contractual, statutory, or other

legal obligation or right of any Party or person with respect to any Confidential Information.

15. The provisions of this Protective Order shall not terminate at the conclusion of this action and may be enforced in this action or in a separate proceeding in the discretion of the Party alleging any breach of this Protective Order.

16. The Parties hereto may stipulate, subject to the approval of the Court, to any mutually agreeable changes to the provisions hereof. If a Party requests any modification(s) to the Protective Order and the Parties are unable to reach an agreement after a meet and confer, the Party requesting a modification may file a motion with the Court seeking such modification and such motion will be heard by the Court in the ordinary course of business.

17. This Protective Order shall be binding upon the Parties, their employees, officers, board members, agents, attorneys, and all persons encompassed by paragraph 2 whether or not such persons individually have executed Exhibit A. The court retains jurisdiction to enforce the provisions of this Protective Order upon the request of any Party or *sua sponte* and to make such arrangements, modifications, and additions to this Protective Order as the Court may from time to time deem appropriate.

18. If a party believes that information it intends to use in this action or Information requested by the opposing party in discovery needs a higher level of protection (*e.g.*, "Attorneys' Eyes Only") than that accorded "Confidential Information" as set forth in this protective order, that party must make a motion for a protective order with the Court. Such motion must set forth the basis for the additional level of protection needed as well as the limitations desired by that moving

party on the dissemination of the information. The party seeking the higher level of protection will have the burden of establishing the need and appropriateness of the higher level of protection.

DATED this 3rd day of December, 1999.

/s/ Thomas W. Biggar
DISCOVERY COMMISSIONER

Submitted by:

HUTCHISON & STEFFEN, LTD.

/s/ Thomas L. Steffen
Thomas L. Steffen
Mark A. Hutchison
John T. Steffen
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117
Attorneys for Plaintiff

Approved as to form:

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS, LLP

/s/ Bryan R. Clark
Thomas R. C. Wilson
James W. Bradshaw
Bryan R. Clark
2300 West Sahara Avenue
Las Vegas, NV 89102

Attorneys for Defendant

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the

Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant on the _____day of _____, 1999 at the following address:

James W. Bradshaw, Esq.
McDonald Carano Wilson
McCune Bergin Frankovich & Hicks
241 Ridge Street, 4th Floor
Reno, Nevada 89501
Attorney for Defendant

_✓_ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 7th day of DECEMBER, 1999.

SHIRLEY R. PARRAGUIRRE
By: /s/ Mary Daigle
Deputy Clerk
MARY DAIGLE

Case Name: *Hyatt v. Franchise Tax Board*

Case Number: A382999

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner, and,

_____ The parties having waived the right to object thereto,

_____ No timely objections having been filed thereto,

✓ BW Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

✓ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 1999.

Dated this 21st day of December, 1999.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE

EXHIBIT A

AGREEMENT CONCERNING MATERIAL COVERED BY A PROTECTIVE ORDER AND ORDER ENTERED IN THE DISTRICT COURT, CLARK COUNTY, NEVADA

I, the undersigned, hereby acknowledge that I have read the attached Protective Order entered in the District Court, Clark County, Nevada in Case No. A2382999 and understand the terms thereof and agree to be bound by all such terms. Without limiting the

generality of the foregoing, I agree not to disclose to any person or entity not authorized to receive such "Confidential Information," pursuant to the terms of said Protective Order, any document or any information designated as "Confidential Information" or any copies of extracts or information derived therefrom, which have been disclosed to me. I further agree to use any information disclosed to me in connection with the above-mentioned case solely for the purpose of this case and for no other purposes.

The undersigned hereby irrevocably submits his/her person to the jurisdiction of the District Court, Clark County, Nevada for the purpose of enforcing said Protective Order:

Date:

Signature

Type or print name:

IN THE SUPREME COURT
OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE. Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

WRIT OF MANDAMUS

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW THEREFORE, you are instructed to grant Franchise Tax Board's motion for summary judgment in light of the lack of evidence presented, in the case entitled Hyatt vs. Franchise Tax Board No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A.

Agosti, Robert E. Rose and Myron E. Leavitt, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 13th day of June, 2001.

[SEAL]

/s/ Jannette Bloom
Supreme Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE.

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 35549

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE.

Respondents,

and

No. 36390

GILBERT P. HYATT,

Real Party in Interest.

ORDER GRANTING PETITION (DOCKET NO. 36390 AND DISMISSING PETITION (DOCKET NO. 35549)

(Filed June 13, 2001)

Franchise Tax Board Petitions this court for a writ of mandamus and/or prohibition in Docket No. 35549, arguing that the district court erred in determining that certain documents were not protected by the attorney-client, work product and/or deliberative process privileges and subsequently ordering those documents released. Franchise Tax Board separately petitions this court for a writ of mandamus in Docket No. 36390, arguing that the district court erred in denying its motion for summary judgment because the doctrine of comity precludes the district court's exercise of jurisdiction over the claims since Franchise Tax Board is immune from liability under California law.

We conclude that the district court did err in denying Franchise Tax Board's motion for summary judgment, albeit on grounds other than those alleged in the petition. Thus, we grant the petition for a writ of mandamus in Docket No. 36390 and direct the district court to conduct further proceedings consistent with this order. Because our resolution of Docket No. 36390 renders the petition in Docket No. 35549 moot, we deny that petition.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty

resulting from an office, or to control an arbitrary or capricious exercise of discretion.[1] This extraordinary remedy is available only when there is no plain, speedy and adequate remedy at law, and it is entirely within this court's discretion whether to issue a writ.[2] Even though a writ of mandamus is the appropriate remedy to review the denial of a motion for summary judgment because the order is otherwise unappealable, this court has limited the exercise of this extraordinary remedy to instances when judicial economy or the need to clarify important issues require our intervention.[3] Because this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers.

According to the United States Supreme Court case of *Nevada v. Hall*[4] and the Nevada case of *Mianeck v. District Court*,[5] the crucial inquiry in determining whether to afford deference to another state's laws under the doctrines of Full Faith and Credit or comity is whether the sister state's laws conflict with or contravene the forum state's laws or policies. In this case, our inquiry rests in

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[1] NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

[2] NRS 34.170; *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[3] *Sorenson v. Pavlikowski*, 94 Nev. 440, 442, 581 P.2d 851, 853 (1978); *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997); *State v. Babayan*, 106 Nev. 155, 787 P.2d 805 (1990); *cf. State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 361 662 P.2d 1338, 1340 (1983).

[4] 440 U.S. 410, 422, 424 n.24 (1979).

[5] 99 Nev. 93, 96, 658 P.2d 422, 424 (1984).

determining whether Nevada law, which grants immunity to state agencies only for discretionary acts,[6] is affronted by recognizing California law, which grants Franchise Tax Board immunity for intentional torts, as well as discretionary and operational acts.[7]

Although the parties addressed only the issue of comity in Docket No. 36390, our review of the record to determine whether comity or Full Faith and Credit should be applied revealed that there is no probative evidence to support Hyatt's claims. Thus, because Hyatt failed to meet his burden of providing probative evidence to generate genuine issues of material fact on each of his claims, the district court erred in denying Franchise Tax Board's motion for summary judgment. We, therefore, grant the petition for a writ of mandamus.

In the context of a summary judgment motion, Franchise Tax Board, as the moving party, has the burden of establishing the non-existence of genuine issues of material fact.[8] But this burden is sustained if Franchise Tax Board demonstrates a lack of probative evidence of at least one element of Hyatt's prima facie case.[9] Hyatt then has the burden of demonstrating specific evidence indicating a genuine dispute of fact.[10] Mere allegations are insufficient

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[6] NRS 41.032(2); *cf.* NRS 41.031; *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970).

[7] Cal Gov't Code § 860.2; *see Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[8] NRCP 56(c); *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 166-67 (1997).

[9] *Rains*, 113 Nev. at 1156, 946 P.2d at 167 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[10] *Id.* at 1157, 946 P.2d at 167.

to sustain this burden; specific facts must be produced to show a genuine dispute that justifies the denial of a motion for summary judgment.[11]

Upon our review of the record, we conclude that Hyatt failed, as a matter of law, to meet his burden to produce sufficient facts,[12] indicating a genuine dispute, that Franchise Tax Board's acts during its investigation constituted intentional torts.[13] There is no evidence, aside from Hyatt's own conclusory allegations, that Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine

[11] NRCP 56(e); *see Bird v. Casa Royale West*, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1981); *see also Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975).

[12] Franchise Tax Board has met its burden that at least one element of Hyatt's claims has not been shown by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters.

[13] *See, e.g., Barmettler v. Reno Air, Inc*, 114 Nev. 441, 447-49, 956 P.2d 1382, 1386-87 (1998) (negligent misrepresentation and outrage), *limited by Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 628-36, 895 P.2d 1269, 1278-83 (1995) (invasion of privacy claims); *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 444-45 (1993) (abuse of process); *M & R Investment Co. v. Mandarino*, 103 Nev. 711, 718-19, 748 P.2d 488, 493 (1987) (invasion of privacy claims); *Star v. Rabello*, 97 Nev. 124, 125-26, 625 P.2d 90, 92 (1981) (outrage).

residency status for taxation pursuant to its statutory authority. Merely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or falsity of statements. No such evidence has been presented in this case.

There is also insufficient evidence of Hyatt's remaining claim of negligent misrepresentation.[14] As with Hyatt's claims for intentional torts, there is no evidence that Franchise Tax Board supplied any false information regarding confidentiality or business relations.

In light of the lack of evidence supporting Hyatt's claims for intentional torts and negligent misrepresentation, we conclude that it was error for the district court to deny the motion for summary judgment.[15] Because we conclude that it was error to deny Franchise Tax Board's motion for summary judgment, and Hyatt's claims should have been dismissed, we need not address the issues raised in Docket No. 35549 regarding purportedly privileged materials.

Consistent with our discussion above, we therefore

GRANT the petition in Docket No. 36390 AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Franchise Tax Board's motion for summary judgment in

[14] *See Barmettler*, 114 Nev. at 447-49, 956 P.2d at 1386-87.

[15] Although neither party addressed this issue in the petitions to this court, the record indicates that the issue of the absence of probative evidence was presented to the district court on the initial motion.

light of the lack of evidence presented.[16] We DISMISS AS MOOT the petition in Docket No. 35549.

/s/ Maupin, , C.J.
Maupin

/s/ Young , J
Young

/s/ Shearing , J
Shearing

/s/ Agosti , J
Agosti

/s/ Rose , J
Rose

/s/ Leavitt , J
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Francovich & Hicks
Bernhard & Leslie
Hutchison & Steffen
Thomas K. Bourke
Riordan & McKenzie
Marquis & Aurbach
Clark County Clerk

[16] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

Statutory Attachments

1. United States Constitution Provisions:

Article IV. The States and The Federal Government

Section One. Official Acts of the States

Full Faith and Credit

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

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2. Government Code § 860.2. Injuries caused by proceedings or application of laws

Neither a public entity nor a public employee is liable for an injury caused by:

(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

(b) An act or omission in the interpretation or application of any law relating to a tax.

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3. Government Code § 905.2. Claims for money or damages against state

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the state:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

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4. Government Code § 911.2. Time of presentation of claims; limitation

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

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5. Government Code § 945.4. Necessity of written claim acted upon by board or deemed to have been rejected

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing

with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

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6. Revenue & Taxation Code § 19041. Protest against proposed deficiency assessment; time; contents

(a) Within 60 days after the mailing of each notice of proposed deficiency assessment the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying in the protest the grounds upon which it is based.

(b) Any protest filed with the Franchise Tax Board on or before the last date specified for filing that protest by the Franchise Tax Board in the notice of proposed deficiency assessment (according to Section 19034) shall be treated as timely filed.

(c) The amendments made by the act adding this subdivision 1 shall apply to any notice mailed after December 31, 1999.

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7. Revenue & Taxation Code § 21021. Action by taxpayer aggrieved by action or omission by officer or employee in reckless disregard of published procedures; amount of damages; frivolous position; penalty

(a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved

by that action or omission may bring an action for damages against the State of California in superior court.

(b) In any action brought under subdivision (a), upon a finding of liability on the part of the State of California, the state shall be liable to the plaintiff in an amount equal to the sum of all of the following:

(1) Actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions.

(2) Reasonable litigation costs, as defined for purposes of Sections 19420 and 26491.1

(c) In the awarding of damages under subdivision (b), the court shall take into consideration the negligence or omissions, if any, on the part of the plaintiff which contributed to the damages.

(d) Whenever it appears to the court that the taxpayer's position in the proceedings brought under subdivision (a) is frivolous, the court may impose a penalty against the plaintiff in an amount not to exceed ten thousand dollars ($10,000). A penalty so imposed shall be paid upon notice and demand from the board and shall be collected as a tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

COMP
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. A382999 Dept. No. X Docket No. R FIRST AMENDED COMPLAINT (Filed June 12, 1998) Jury Trial Demanded Exempt from Arbitration: Declaratory Relief, Significant Public Policy and Amount in Excess Of $40,000

Plaintiff, Gilbert P. Hyatt, in this First Amended Complaint, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of

their employer's or principal's business, whether the employer or principal be the FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular, and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California (FIRST CAUSE OF ACTION); (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their

investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of compensatory and punitive dmages against the FTB and defendants for fraud (SEVENTH CAUSE OF ACTION); and (6) for compensatory damages against the FTB and defendants for negligent misrepresentation (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

Plaintiff's Residency in Nevada

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his

personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiffs' [sic] extensive search, commencing in early October 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has

substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

The FTB and Defendants' Investigation of Plaintiff in Nevada

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada,

including plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12. above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled to "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt

by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

Assessment for 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the period of September 26 through December 31, of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the

assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based on governmental greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

The FTB's Continuing Pursuit of Plaintiff in Nevada

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite

the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "we [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1991 in amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on" extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded

its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

The FTB's Motive

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and

therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

Jurisdiction

26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individuals' income subject to California state income tax during such period, the individual must have been domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

(a) Domicile.

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from

another state; (8) registering a car in another state; (9) joining religious, business and/or social organizations in another state; and (10) establishment of a successful business in an other state by an individual who is self employed.

(b) Temporary or Transitory Purpose.

The following contacts which are similar although not identical to those used to determine domicile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another state; (8) obtaining a driver's license from another state; (9) registering a car in another state; (10) joining religious, business and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of

evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an apartment in Las Vegas on or about October 7, 1991 and, after a brief period of necessary travel to the east coast, took possession of said apartment on or about October 22, 1991 and maintained his residence there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's license (relinquishing his California driver's license to the Nevada Department of Motor Vehicles), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, commencing in early October 1991, and submitted numerous offers on houses in Las Vegas beginning in December 1991; (6) one of plaintiff's offers to purchase a home in Las Vegas was accepted in March of 1992 and escrow on the transaction closed on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation

on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon The Seclusion of Another)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or

business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex

and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiffs' privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given To Private Facts)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs

1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff in a False Light)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme,

oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient

to satisfy the purposes for which such damages are awarded.

SIXTH CAUSE OF ACTION

(For Abuse of Process)

54. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, and 51 and 53, above, as if set forth herein verbatim.

55. Despite plaintiff's ongoing effort, both personally and through his professional representatives, to reasonably provide the FTB with every form of information it requested in order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada since September 26, 1991, the FTB has willfully sought to extort vast sums of money from plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for which the FTB is empowered to act as an agency of the government of the State of California; said administrative proceedings have been lawlessly and abusively directed into the State of Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized in the attempt to extort money from plaintiff as aforesaid.

56. The FTB, without authorization from any Nevada court or governmental agency, directed facially authoritative "DEMAND[S] TO FURNISH INFORMATION," also referred to herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and businesses, *requiring* specific information about plaintiff. The aforesaid "Demands" constituted an actionable

abuse of process with respect to plaintiff for the following reasons:

(a) Despite the fact that each such "Demand" was without force of law, they were specifically represented to be "Authorized by California Revenue & Taxation Code Section 19504 (formerly 19254(a) and 26423 (a)[ ])," sent out by the State of California, Franchise Tax Board on behalf of "The People of the State of California" to each specific recipient, and were prominently identified as relating to "*In the Matter of*: Gilbert P. Hyatt;" Plaintiff was also identified by his social security number, and in certain instances by his actual home address in violation of express promises of confidentiality by the FTB; although the aforesaid "Demands" were not directed to plaintiff, the perversion of administrative process which they represented was motivated by the intent to make plaintiff both the target and the victim of the illicit documents;

(b) Each such "Demand" was unlawfully used in order to further the effort to extort monies from plaintiff that could not be lawfully and constitutionally assessed and collected because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB has sought to collect taxes from him, and plaintiff has not generated any California income during any of the pertinent time periods;

(c) Each such "Demand" was submitted to Nevada residents, professionals, and businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money to the FTB without factual or constitutional justification, and without the intent or prospect of resolving any legal dispute; indeed, as noted above, many of the

"Demands" were used as vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful scheme;

(d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated that they were issued to secure information (about plaintiff) "for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated," and then proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

(e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands," and each of the "Demands" or quasi-subpoenas constituted legal or administrative process targeting plaintiff that was not proper in the regular conduct of the FTB's administrative proceedings against plaintiff;

(f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative nature and language of the documents, as opposed to courteous letters of inquiry that tax auditors and the FTB sent to certain governmental agencies and officials who were viewed as potential sources of criticism

or trouble if confronted with the deceptive attempt to exact [sic] sensitive information from them through means of facially coercive documents purporting to have extraterritorial effect based upon the authority of California law;

(g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and the personal, investigative forays into Nevada by FTB agents, as detailed above, a representative of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan, Esq., that at this "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers over their contested assessments almost always settle because these taxpayers do not want to risk having their personal financial information being made public, thus the "suggestion" by Ms. Jovanovich concerning settlement was made with the implied threat that the FTB would release highly confidential financial information concerning plaintiff if he refused to settle, another deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by plaintiff;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money which it has sought to secure by extortion, and without justification in law or equity, the FTB compounded its abuse of its administrative powers by assessing plaintiff huge penalties based on patently false and frivolous accusations, including but not limited to, the concealment of assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming Nevada residency;

(i) The FTB and Sheila Cox knew that they had no authority to issue **"DEMAND[S] TO FURNISH INFORMATION"** to any Nevada resident, business or entity, and that it was a gross abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid "Demands" were purportedly authorized; that the aforesaid section of the California Revenue and Taxation Code contains no provision that remotely purports to empower or authorize the FTB to issue such facially coercive documents to residents and citizens of Nevada in Nevada; and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada citizens and businesses into believing that they were under a compulsion to respond to the "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB nevertheless deliberately and calculatingly abused the process authorized by the aforesaid section of the California Revenue and Taxation Code in order to promote their attempts to extort money from plaintiff;

(j) From the outset, the determination by Sheila Cox and the FTB to utilize the **"DEMAND[S] TO FURNISH INFORMATION"** in Nevada, constituted a deliberate, unlawful, and despicable decision to embark on a course of concealment in the effort to produce material, information, pressure and sources of distortion that would culminate in a combination of sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for money; and the course of concealment consisted of concealing from plaintiff the fact that the aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses, and in hiding from the recipients of the "Demands" the fact that despite their stated support in

California law, the documents had no such support and were deceitful and bogus documents; and

(k) The FTB further abused its legal, administrative process by issuing the bogus quasi-subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with notice of such discovery as required by the due process clause of Article I, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

57. As a direct, proximate and foreseeable result of the FTB and defendants' intentional and malicious abuse of the administrative processes, which the FTB initiated and unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress in an amount in excess of $10,000.

58. Plaintiff is informed and reasonably believes, and therefore alleges, that said abuse of the administrative processes initiated and pursued against plaintiff was willful, intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully extort substantial sums of money from plaintiff that could not be remotely justified by any honorable effort within the purview of the powers conferred upon the FTB by the State of California relating to all aspects of taxation, including the powers of investigation, assessment and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes of which such damages are awarded.

SEVENTH CAUSE OF ACTION

(For Fraud)

59. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, above, as if set forth herein verbatim.

60. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as the taxing authority of the State of California when the FTB first contacted him on or about June 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact, plaintiff had become a recognized and prominent force in the computer electronics industry, and he was vitally interested in maintaining both his personal and business security, as well as the integrity of his reputation as a highly successful inventor and owner and licensor of significantly valuable patents.

61. During the course of seeking information and documents relating to the 1991 "audit," and repeatedly thereafter, the FTB absolutely promised to maintain in the strictest of confidence, various aspects of plaintiff's circumstances, including, but not limited to, his personal home address and his business and financial transactions and status; and plaintiff's professional representatives took special measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining solemn commitments from FTB agents to maintain in the strictest of confidence (assured by supposedly secure arrangements) all of plaintiff's confidential information

and documents; and the said confidential information and documents were given to the FTB in return for its solemn guarantees and assurances of confidentiality, as aforesaid.

62. Despite the aforesaid assurances and representations of confidentiality by the FTB, said assurances and representations were false, and the FTB knew they were false or believed they were false, or were without a sufficient basis for making said assurances and representations. Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, and without notice to either, Sheila Cox and the FTB were in the process of sending the bogus **"DEMAND[S] TO FURNISH INFORMATION"** to the utility companies in Las Vegas which demonstrated that the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal home address in Las Vegas, thus making this highly sensitive and confidential information essentially available to the world through access to the databases maintained by the utility companies. Specific representative indices of the FTB's fraud include:

(a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed, the enclosed materials are highly confidential and we do appreciate your utmost care in maintaining our confidentiality." This letter is contained within the files of the FTB, and the FTB noted in its chronological list

of items, the receipt of the aforesaid escrow instructions with "Address deleted;"

(b) In the FTB's records concerning its Residency Audit of 1991 of Gilbert P. Hyatt, the following pertinent excerpts of notations exist:

(I) 2/17/95 – "[Eugene Cowan] wants us to make as few copies as possible, as he is concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need copies, as the cases often take a long time to complete and that cases which go to protest can take several years to resolve[;]"

(ii) 2/21/95 – "LETTER FROM REPRESENTATIVE MIKE KERN Earlier document request was transferred to Eugene Cowan due to the sensitive and confidential nature of documentation[;]"

(iii) 2/23/95 – "Meeting [between Sheila Cox and] . . . Eugene Cowan . . . Mr. Cowan stressed that the taxpayer is very worried about his privacy and does not wish to give us copies of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He said that the taxpayer is fearful of kidnapping." [sic] This latter reference to "kidnaping" is a fabrication by Sheila Cox in an apparent effort to downplay in the FTB's records, the importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality, the FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being concerned about industrial espionage and other risks associated with the magnitude of plaintiff's position in the computer electronic industry;

(iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of the FTB enclosing copies of

various documents. He then stated: "As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access[;]" and

(v) 8/31/95 – In a letter sent to Eugene Cowan, Esq. by Sheila Cox on 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy[:]"

(c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr. Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the FTB's stringent Security and Disclosure policy (the violation of which may subject the offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's "understanding that you will retain these materials in locked facilities with limited access" (thereby again underscoring the understanding that all information and documents provided to the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox sent a **"DEMAND TO FURNISH INFORMATION"** to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, providing each such company with the plaintiff's personal home address, thereby demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurance of confidentiality.

63. Plaintiff further alleges that from the very beginning of the FTB's notification to plaintiff and his professional representatives of its intention to audit his 1991 California taxes, express and implied assurances and representations were made to plaintiff through his representatives, that the audit was to be an objective inquiry into the status of his 1991 tax obligation; and that upon information and belief, based on the FTB's subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its agents were determined to share in the highly successful produce of plaintiff's painstaking labor through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by the FTB include:

(a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his California residence on October, 1, 1991 to his business associate and confident, Grace Jeng, to the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore evidence of plaintiff's continued California residency and his attempt to evade California income tax by fraud;

(b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and interest derived from the sale of his LaPalma, California home on his 1991 income tax return, factors that were ignored by the FTB as it concluded that since the grant deed on the home was not recorded until June, 1993, the sale was a sham, as aforesaid, and a major basis for assessing fraud penalties against plaintiff as a means of building the pressure for extortion;

(c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no credible evidence,

and can indeed provide none, that would indicate that plaintiff continued to own or occupy his former home in La Palma, California which he sold to his business associate and confident, Grace Jeng on October 1, 1991;

(d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham," the FTB later declined to compare the much less expensive California home with the home plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency) stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las Vegas home will not be weighed in the determination [of residency], as the taxpayer sold the **La Palma** house on 10/1/91 before he purchased the house in **Las Vegas** during April of 1992." (Emphasis added.); and

(e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses without prior notice to plaintiff, and concerning which a number of such official documents indicated that plaintiff was being investigated from January 1995 to the present, all with the intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the State of California.

64. The FTB and its agents intended to induce plaintiff and his professional representatives to act in reliance on the aforesaid false assurances and representations in order to acquire highly sensitive and confidential information from plaintiff and his professional representatives, and place plaintiff in a position where he would be vulnerable to the FTB's plans to extort large sums of

money from him. The FTB was keenly aware of the importance plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards involving the extreme need for security in plaintiff's work and place of residence. The FTB also knew that it would not be able to obtain (at least without the uncertain prospects of judicial intervention) the desired information and documents with which to develop colorable, ostensible tax assessments and penalties against plaintiff, without providing plaintiff and his professional representatives with solemn commitments of secure confidentiality.

65. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and representations by the FTB and its agents, and having no reason to believe that an agency of the State of California would misrepresent its commitments and assurances, did agree both personally and through his authorized professional representatives to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents; in fact, plaintiff relied on the false representations and assurances of the FTB and its agents to his extreme detriment.

66. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to plaintiff, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of $10,000.

67. The aforesaid misrepresentations by the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or

punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

EIGHTH CAUSE OF ACTION

(For Negligent Misrepresentation)

68. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, and 60 through 65, above, as if set forth herein verbatim.

69. The FTB, in providing plaintiff and his professional representatives assurances of strict confidentially with respect to the sensitive and highly confidential information and documents it sought to obtain from plaintiff concerning, allegedly, its 1991 tax year audit of plaintiff, as detailed above, owed a duty to plaintiff to inform him that the FTB, through its agents, may not have been able to maintain, or otherwise would not maintain, the strict confidentiality it had promised plaintiff in order to secure confidential information and documentation from him.

70. When the FTB revealed to public sources and third persons the highly sensitive and confidential information and documentation it had promised to retain under conditions of strict confidentiality, it breached its duty to plaintiff as described in paragraph 68, above.

71. The relationship between the FTB and plaintiff, was in every sense one of business and trust, as plaintiff was required to employ professional tax attorneys and accountants in order to deal with the FTB's demands, and

the FTB's interest was in determining means and methods whereby it could secure revenue from plaintiff. Although plaintiff was forced to deal with the FTB as a matter of law, it was clear that the asserted purpose for the mutual intercourse was a determination as to whether plaintiff may have owed additional taxes for calendar year 1991 for which he had enjoyed the benefits provided to him by the State of California. The negotiations that occurred between plaintiff, through his professional representatives, and the FTB and its agents, over terms under which information and documentation would be made available to the FTB were also part of what must assuredly be viewed as a business relationship.

72. As a direct, proximate and foreseeable result of the FTB's breach of duty to plaintiff, as alleged above, plaintiff has sustained great damage, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of $10,000.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB

had no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi-subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SEVENTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For costs of suit;

3. For reasonable attorneys' fees; and

4. For such other and further relief as the Court deems just and proper.

DATED this 11th day of June 1998.

HUTCHISON & STEFFEN

By: /s/ Thomas L. Steffen
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